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No. 73-1966

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

ABERDEEN AND ROCKFISH RAILROAD COMPANY, *et al.*,
Appellants,

v.

STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (S.C.R.A.P.), *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY OF THE ABERDEEN AND ROCKFISH RAILROAD COMPANY, ET AL.

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August 1974

TABLE OF CONTENTS

	Page
REPLY	1
CONCLUSION	21

TABLE OF CASES

CASES:

Alabama Power Co. v. *United States*, 316 F. Supp. 337 (D.D.C. 1970), *aff'd by an equally divided Court*, 400 U.S. 73 (1970) 12

Algoma Coke & Coal Co. v. *United States*, 11 F. Supp. 487 (E.D. Va. 1935) 17

Atlantic City Elec. Co. v. *United States*, 306 F. Supp. 338 (S.D.N.Y. 1969), *aff'd by an equally divided Court*, 400 U.S. 73 (1970) 12

Ayrshire Collieries Corp. v. *United States*, 331 U.S. 132 (1947) 7

Chicago, M., St. P. & P. R.R. v. *United States*, 366 U.S. 745 (1961) 3

City of New York v. *United States*, 337 F. Supp. 150 (S.D.N.Y. 1972) 18

City of New York v. *United States*, 344 F. Supp. 922 (S.D.N.Y. 1972) 18

Electronic Industries Ass'n v. *United States*, 401 U.S. 967 (1971) 12-14, 16-17

Gulf R. & D. Co. v. *Schlumberger Well Sur. Corp.*, 92 F. Supp. 16 (S.D. Cal. 1960) 10

Gunn v. *University Committee to End the War*, 339 U.S. 383 (1970) 14

Kennedy v. *Mendoza-Martinez*, 372 U.S. 144 (1963) ..14-15

Lambert Co. v. *Baltimore & O. R.R.*, 258 U.S. 377 (1922) 11

Mitchell v. *Donovan*, 398 U.S. 427 (1970) 14-15

Phillips v. *United States*, 312 U.S. 246 (1941) 14

Public Service Comm'n v. *Brashear Freight Lines, Inc.*, 306 U.S. 204 (1939) 14

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1. In opposing the appeals taken by the railroads (No. 73-1966) and the Government (No. 73-1971), the main contention of each of the three sets of appellees is that this Court lacks jurisdiction to entertain direct appeals from the order entered by the three-judge district court.[1] Appellees' legal position is directly con-

[1] See motion to dismiss or affirm of EDF *et al.*, pp. 2-6; motion to dismiss or for summary affirmance of NARI *et al.*, pp. 12-13; and motion to dismiss of ISIS, pp. 2-3.

trary to decades of settled practice under the statutes here involved, and it is squarely refuted by the legislative history of the relevant statutes which is nowhere mentioned in appellees' motions. Indeed, as we show below, only a few years ago this Court considered and appears to have unanimously rejected the purported legal distinction that is the basis of the appellees' jurisdictional argument here.

It is beyond dispute that, under the governing statutory provisions, an order of a district court "enjoining" an ICC order (other than an ICC order for the payment of money) can be issued only by a district court of three judges[2] and such a district court order is directly appealable to this Court.[3] In this case a three-judge district court entered an order setting aside two ICC orders, stating expressly that the two orders were "vacated" (Gov. J.S. 2b), and the Government and the railroads filed direct appeals to this Court. Thus, the gist of the appellees' motions is that, while a district court order enjoining an ICC order must

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[2] Under 28 U.S.C. § 2321, the provisions of 28 U.S.C. §§ 2322-25 govern all district court actions "to enforce, suspend, enjoin, annul or set aside in whole or in part any order" of the ICC; the only exception, which is not here relevant, is for ICC orders for the payment of money, including fines, penalties or forfeitures. Section 2325 provides that "[a]n interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order" of the ICC shall not be granted "unless the application therefor is heard and determined by a district court of three judges . . . ."

[3] Under 28 U.S.C. § 1253, except as otherwise provided by law, any party may appeal to this Court "from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by an Act of Congress to be heard and determined by a district court of three judges."

be heard by a three-judge district court and is directly appealable here, an order of a three-judge district court which sets aside an ICC order is distinguishable and is not subject to direct appeal in this Court.

The legislative history of the pertinent statutory provisions, buttressed by years of consistent practice in this Court, refutes any such attempted distinction: that history shows that Congress intended from the outset that orders of the ICC would be reviewable by three-judge district courts and that orders of such courts invalidating (or refusing to invalidate) the ICC's orders would be subject to direct appeal to this Court. Moreover, Congress intended these requirements to apply whenever direct review of ICC orders was sought and without regard to whether the district court's own order was styled as an order enjoining the agency's order, setting it aside, or invalidating it in any other equivalent terms. For years, these premises have been accepted as settled by this Court, by commentators, by Congress and by the ICC itself.

As described more fully below, the requirement of a three-judge district court and direct Supreme Court review in actions seeking review of ICC orders—including actions to "set aside" such orders—originated in 1913 and has been maintained to the present time. In any number of cases, this Court has considered direct appeals from three-judge district courts in actions described by this Court as ones to "set aside" ICC orders. *E.g., Chicago, M., St. P. & P. R.R.* v. *United States,* 366 U.S. 745, 746 (1961); *Schaffer Transp. Co.* v. *United States,* 355 U.S. 83, 87 (1957). A leading treatise writer on federal practice has summarized the law by describing, as a paradigm case appropriate for a three-judge court, "a suit to set

aside an Interstate Commerce Commission order." C. Wright, *Federal Courts* 191 (2d ed. 1970). See also Burstein, "Judicial Review of ICC Orders," 38 *ICC Prac. J.* 174, 181 (1971).

In recent hearings on a bill proposing to transfer review of ICC orders to the courts of appeals, the author of the bill, Senator Hruska, said that "[a]t present, the judicial review of Interstate Commerce Commission orders is under the jurisdiction of three-judge district courts" and "[t]he decisions of such courts are reviewable in the Supreme Court by appeal." The Deputy Assistant Attorney General in charge of the Antitrust Division (which ordinarily represents the United States, the statutory defendant in ICC review proceedings), said that "[s]ince the adoption of the Urgent Deficiencies Act of 1913, orders of the Commission, except those for the payment of money, have been reviewed in the U.S. district courts by panels of three judges . . . . Appeals from these statutory three-judge district courts lie directly to the Supreme Court and are a matter of right." The Chairman of the ICC in his prepared statement said that "[j]udicial review of orders of the Interstate Commerce Commission . . . is by a U.S. District Court of three judges . . . with the decisions of these three-judge courts reviewable in the Supreme Court by appeal. . . ."[4]

Legislative history squarely confirms this generally accepted construction of the law. The Hepburn Act

[4] *Hearing on S. 3597 before the Subcommittee on Improvements in Judicial Machinery of the Senate Judiciary Committee*, 91st Cong., 2d Sess. 1, 3, 17 (1970). See also *id.* at 27 (American Bar Association), 29 (Association of American Railroads), 32 (Motor Carrier Lawyers Association), 35 (Chief Judge Phillips of the Sixth Circuit), 35 (Association of ICC Practitioners), 36 (National Industrial Traffic League), 38 (American Trucking Associations).

of 1906 made ICC orders self-executing, and accordingly provided for judicial review of the orders. 34 Stat. 589, 592. At this time, there already existed the Expediting Act of 1903 (32 Stat. 823) which established jurisdiction and procedures by which a circuit court of three judges heard certain types of antitrust cases and appeals were taken directly to the Supreme Court. This three-judge court procedure, with direct appeal to the Supreme Court, was made applicable by the Hepburn Act to actions to "enjoin, set aside, annul or suspend any order or requirement of the Commission . . . ." 34 Stat. 592. Thus, the convocation of a three-judge court and direct review of its decision in this Court was not dependent on a request for injunctive relief. The three-judge court and direct review procedures in ICC cases originated independently of the procedures for three-judge courts and direct Supreme Court review in suits to enjoin the enforcement of statutes alleged to be unconstitutional, which did not develop until 1910. 36 Stat. 557.

After the brief experiment with review of ICC orders by the Commerce Court, constituted especially for that purpose (36 Stat. 539), the Urgent Deficiencies Act of 1913 (38 Stat. 208, 219) reinstituted review by three-judge courts. The Urgent Deficiencies Act provided in relevant part as follows:

> "No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be

heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. . . . An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; *and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply.* A final judgment or decree of the district court may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases." 38 Stat. 220 (emphasis supplied).

Plainly, under this language a suit such as the present one, which resulted in setting aside orders of the ICC, would require a three-judge district court and the district court's order granting or denying relief would be subject to direct review in this Court. As shown below, Congress has never indicated any intent to change the substance of the Urgent Deficiencies Act on this issue despite rephrasing of its language in the course of codification.

The Urgent Deficiencies Act not only demonstrates Congress' intent under that statute that three judges preside over actions to set aside ICC orders and that their grant or denial of such relief be directly reviewable in this Court, but also that Congress did not re-

gard enjoining ICC orders and setting them aside as separate concepts. Thus, the first sentence of that statute quoted above contemplated that three judges might grant an "interlocutory injunction . . . setting aside" an ICC order. Such an injunction might itself be an incident of a suit to "set aside" finally the ICC order, for which three judges were again required. In *Ayrshire Collieries Corp.* v. *United States,* 331 U.S. 132, 141 (1947), this Court confirmed that to enjoin and set aside ICC orders were essentially interchangeable concepts; there it described the final hearing clause of the Urgent Deficiencies Act—which in terms refers to "any suit brought to suspend or set aside" an ICC order—as embracing any suit "brought to enjoin the enforcement of a Commission order."

The Urgent Deficiencies Act provisions here involved remained in effect from 1913 to 1948.[5] In 1948, as part of the revision of Title 28 and its enactment into positive law (62 Stat. 869), the Urgent Deficiencies Act provisions were revised, but no intent whatever appears to alter their meaning, scope and purpose so far as concerns the three-judge court requirement for review of ICC orders and the provision for direct review in this Court. As a result of the revision, whose pertinent language remains unchanged today, Section 2321 of Title 28 provided that the procedure in district courts in "actions to enforce, suspend, enjoin, annul or set aside in whole or in part" any ICC order except orders for payment of money, fines, penalties or forfeitures "shall be as provided in this chapter." Sec-

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[5] In the intervening period the provisions were incorporated, without relevant change in language, into the various codifications of Title 28 which were not, in any event, positive law. *E.g.*, 28 U.S.C. §§ 47, 47a (1940).

tion 2325, the final section in the "chapter" referred to in Section 2321, required three judges for "interlocutory or permanent injunctions restraining the enforcement, operation or execution, in whole or in part, of any order" of the ICC. Section 1253 consolidated provisions for direct appeals from three-judge district courts by providing that orders of such courts granting or denying interlocutory or permanent injunctions were subject to direct review in this Court.

As appellees in this case seek to read the 1948 revision, Congress would for the first time have introduced a subtle and pointless distinction between actions to enjoin ICC orders and all other actions seeking directly to invalidate such orders.[6] While an action to "suspend" or to "annul" or to "set aside" an ICC order would be subject to the requirement of the chapter that the action be brought against the United States (Section 2322), to the provision of the chapter governing intervention by the ICC and other parties (Section 2323), and to the provision granting the reviewing court stay powers (Section 2324), only an action to "enjoin" an order would be heard and determined by a court of three judges under Section 2325 or would be subject to direct appeal to this Court under Section 1253.

The legislative history of the 1948 revision which produced Section 2325 and Section 1253 makes it patent that no such drastic change was ever contemplated either by the revisers or by Congress. The reviser's note to Section 2325 discloses *inter alia* that it derived from "title 28, U.S.C., 1940 ed., § 47, (Oct.

[6] There is certainly no difference in practical effect between enjoining an ICC order and setting it aside. In both cases, the result is that on judicial review the order has been invalidated.

22, 1913, ch. 32, 38 Stat. 220)," which is the Urgent Deficiencies Act,[7] and that the provision for direct appeal to the Supreme Court in three-judge cases was located in Sections 1253 and 2101 (which fixes the time for appeal). The reviser's note to Section 1253 states pertinently that "[t]his section consolidates the provisions of sections 47, 47a, 380, and 380a of title 28, U.S.C., 1940 ed., relating to direct appeals from decisions of three-judge courts involving orders of the Interstate Commerce Commission or holding State or Federal laws repugnant to the Constitution of the United States." Nothing in the reviser's notes shows any intent whatever to vary the scope of cases involving ICC orders to which the three-judge requirement or direct appeal provisions apply.

The reviser's notes are authoritative in the construction of the 1948 revision.[8] Accordingly, the construction here of Sections 2325 and 1253 is governed by the long-standing principle of *United States* v. *Ryder,* 110 U.S. 729, 740 (1884), that "[i]t will not be inferred that the legislature, in revising and consolidating the laws, intended to change their policy, unless such intention be clearly expressed." The chief reviser of the 1948 revision of Title 28 confirmed that this principle expressed the intention of the revisers, stating: "Because of the necessity of consolidating, simplifying

[7] The reviser's note stated both that Section 2325 was based on Section 47 and that it was based on the first sentence of Section 47. The first sentence of Section 47 related only to interlocutory relief while Section 2325 explicitly covers both interlocutory and permanent relief. The reviser's reference to the first sentence of Section 47 can reasonably be understood to mean that certain language from that sentence was utilized in phrasing Section 2325.

[8] *United States* v. *National City Lines,* 337 U.S. 78, 81, 82 (1949); *Stainback* v. *Mo Hock Ke Lok Po,* 336 U.S. 368, 376 n.12 (1949).

and clarifying numerous component statutory enactments no changes of law or policy will be presumed from changes of language in revision unless an intent to make such changes is clearly expressed."[9]

The magnitude of the change that would be worked by reading Sections 2325 and 1253 as inapplicable to actions to set aside ICC orders is itself the surest proof that no such change was intended *sub silentio* by the revisers or by Congress. Virtually every case seeking to enjoin an ICC order could as readily be cast as a suit to set it aside and brought before a single judge no matter how critically important the order. Indeed, if the Urgent Deficiencies Act as well as Section 2325 were to be read in wholly mechanical fashion, the change effected by the new section would be 180 degrees: for, in terms, the Urgent Deficiencies Act applied the three-judge requirement to final hearings of actions to "suspend or set aside" ICC orders and *not* to actions to enjoin such orders.[10]

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[9] W. Barron, "The Judicial Code—1948 Revision," 8 F.R.D. 439, 445 (1949). Barron cited *Ryder* and numerous subsequent decisions of this Court to the same effect. *Id.* at 446-48. Accord, *Gulf R. & D. Co.* v. *Schlumberger Well Sur. Corp.*, 92 F. Supp. 16, 18 (S.D. Cal. 1950) (quoting Barron).

[10] Were Section 2325 now construed so literally as to allow a single judge to decide actions to set aside ICC orders, at least one other anomaly would arise so odd and contrary to history as to preclude this construction. Section 2324 empowers the reviewing court to "restrain or suspend . . . the operation of" the ICC order under review pending a final determination; and under any construction of Section 2325, its requirement of three judges for an "interlocutory . . . injunction . . . restraining the . . . operation" of an ICC order would apply to such a temporary restraint or suspension. The strange consequence would be that in an action to set aside an ICC order, *pendente lite* relief could be granted only by three judges but ultimate relief could be granted by a single judge.

The review of the generality of ICC orders by one-judge district courts would also be contrary to the long-established Congressional policy reflected in the Urgent Deficiencies Act. By providing for three-judge review followed by direct appeal, "Congress sought to guard against ill-considered action by a single judge and to avert delays ordinarily incident to litigation," in cases having the public importance and widespread effect of non-money ICC orders. See *United States* v. *Griffin*, 303 U.S. 226, 233 (1938). Use of one-judge district courts to review ICC orders has always been narrowly limited, principally to cases involving review of money orders. Indeed, the courts have been alert to insure that actions which in substance seek to set aside non-money ICC orders are heard in three-judge courts, even though the complaining parties otherwise described their actions.[11]

Given the uniform practices of courts and the unvarying policy of Congress to maintain three-judge review of ICC orders and direct appeals to this Court during the many years prior to the 1948 revision of Title 28, it would be bizarre indeed to conceive that the revisers, without any mention of the point or the barest notice to Congress, intended to curtail drastically this procedure. Moreover, as noted at the outset of this discussion, in the 26 years since 1948 this Court, lower courts, commentators, legislators and lawyers have all continued to regard the pertinent law

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[11] Thus, three judges are required in actions brought to enjoin private parties from conduct directed or authorized in ICC orders where indirectly these actions impeach the Commission's orders. See *Lambert Co.* v. *Baltimore & O. R.R.*, 258 U.S. 377, 381-82 (1922); *Venner* v. *Michigan Central R.R.*, 271 U.S. 127, 130 (1926); *United States* v. *Railway Express Agency*, 101 F. Supp. 1008, 1012 (D. Del. 1951).

as unchanged. Even the recent consideration in Congress of bills to alter the governing statute, in a way that would retain three-judge review of ICC orders, but eliminate certain inconveniences by transferring review to the courts of appeals, has proceeded on the assumption that at present actions to set aside ICC orders are reviewable in three-judge district courts followed by direct review in this Court. See p. 4, above.

Finally, it appears that this Court only recently determined, in the course of deciding *Electronic Industries Ass'n* v. *United States,* 401 U.S. 967 (1971), that there was no jurisdictional difference between an action to enjoin and an action to set aside an ICC order, so that a decision by a three-judge district court setting aside or refusing to set aside an ICC order is directly reviewable in this Court, however the district court's order may be couched. The *Electronic Industries* case was pending here when this Court by a four-to-four vote affirmed decisions of two three-judge district courts that ICC general revenue orders are not reviewable, even where the attacks are directed to the ICC's general revenue findings and not to the increases on particular classes of rates.[12] *Electronic Industries* also involved attacks on the same general revenue orders involved in the other two cases, but unlike those two cases, the attacks in *Electronic Industries* were clearly and exclusively directed not to the general revenue findings but to the rate increases on particular groups of commodities,

[12] *Atlantic City Elec. Co.* v. *United States,* 306 F. Supp. 338 (S.D.N.Y. 1969), and *Alabama Power Co.* v. *United States,* 316 F. Supp. 337 (D.D.C. 1970), *both aff'd by an equally divided Court,* 400 U.S. 73 (1970).

i.e., certain radio, television and other electronic components or accessories. 310 F. Supp. at 1287.

After the first two decisions were affirmed by an equally divided Court, this Court turned to the *Electronic Industries* case and directed the parties to submit supplemental memoranda on two further, related questions that are pertinent here.[13] In substance, these questions posed the issue whether a suit to enjoin ICC orders is precluded by the availability of a suit to set them aside and, if so, whether the latter suit would have to be tried to a three-judge district court. If both questions were resolved in the affirmative, this might have led this Court to remand the appeal on the grounds the suit should have been brought before a one-judge court with review in the court of appeals.

All the parties to the case—the appellant Electronic Industries Association, the United States and the ICC, and the railroads—submitted memoranda agreeing that the questions had to be answered in the negative. Setting forth the legislative history which is repeated above, the memoranda concluded that there was no pertinent distinction between actions to enjoin and actions to set aside ICC orders and that such actions

[13] The questions, posed by letters from the Clerk to the parties on January 21, 1971, were as follows:

> "In light of 49 U.S.C. § 15(2), 28 U.S.C. §§ 2321-2325, Fed. Rule Civ. Proc. 62, and other applicable provisions of Titles 28 and 49 of the United States Code:
>
> 1. Is injunctive relief precluded by the availability of an adequate remedy in an action to set aside the ICC orders which appellant sought to enjoin?
>
> 2. Must an action to set aside an ICC order be heard and determined by a three-judge court?"

were in both instances subject to the three-judge court requirement.[14] This Court did not remand the appeal; rather it unanimously affirmed the district court's judgment by an eight-to-zero vote.[15] This Court necessarily acknowledged its jurisdiction over the appeal by affirming rather than remanding, and it did so after a full consideration of legislative history set forth above. The Court similarly has jurisdiction to entertain the present appeals.

Appellees in their motions to dismiss ignore the legislative history of the statutory provisions relating to ICC orders and rest principally upon decisions construing the statutory provisions involving injunctions against unconstitutional statutes.[16] Both the legislative development of these latter provisions and the policies underlying them are different than those re-

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[14] The United States and ICC confined their memoranda to these issues. The railroads discussed these issues at length but also contended that, without regard to the questions posed, no one had been prejudiced by the court proceedings and that a one-judge district court, like a three-judge district court, would have been bound to dismiss the complaint.

[15] It should be pointed out that the district court's order in that case, like the order of the district court in the present case, was not literally couched in terms of an order granting or denying an injunction. As the opinion in *Electronic Industries* shows, the court concluded by ordering that "the action is dismissed." 310 F. Supp. at 1289.

[16] *E.g.*, *Public Service Comm'n* v. *Brashear Freight Lines, Inc.*, 306 U.S. 204 (1939); *Mitchell* v. *Donovan*, 398 U.S. 427 (1970); *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144 (1963); *Gunn* v. *University Committee to End the War*, 399 U.S. 383 (1970); *Phillips* v. *United States*, 312 U.S. 246 (1941); *Rorick* v. *Board of Comm'rs*, 307 U.S. 208 (1939).

lating to the review of ICC orders.[17] Unlike the narrow construction given to the latter provisions, the provisions requiring three judges to review ICC orders and allowing direct appeals from such decisions have always been construed generously. See p. 11, above. In sum, the cases and arguments advanced by appellees do not even begin to raise any jurisdictional doubts: legislative history, past practice of this Court, and the common understanding of scholars and legislators confirm that the validity of ICC orders must be determined by three-judge district courts and orders of such courts sustaining or setting aside such ICC orders are subject to direct appeal to this Court.[18]

2. Appellees contend that, assuming that this Court does have jurisdiction over the appeals of the railroads and the Government, the substantive issues raised in the jurisdictional statements do not require plenary consideration and the district court's decision should be summarily affirmed on all points. The jurisdic-

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[17] Whereas the legislative history of the provisions relating to ICC orders shows that they were designed to embrace actions to invalidate ICC orders however the actions might be denominated, the legislative history of the provisions relating to unconstitutional statutes shows that they have always been couched to embrace only actions seeking injunctive relief. See, *e.g.*, 36 Stat. 557; *Kennedy* v. *Mendoze-Martinez*, *supra*, 372 U.S. at 154-55.

[18] Although the clear propriety of review in this Court makes the point academic, it should be noted that appellees would not on any view of the matter be entitled to dismissal of the appeals. Even if this Court decided that the district court's order here was not directly appealable to this Court, the established remedy would be to "vacate the judgment below and remand the case" so that the district court could enter a new order and afford appellants the opportunity to take a timely appeal to the court of appeals. See *Mitchell* v. *Donovan*, *supra*, 398 U.S. at 431-32 & n.4 (citing authorities).

tional statements of the railroads and the Government showed at length that the questions presented are substantial, recurring, and of great practical significance both for the agency and for the rail transportation system. In light of this showing, it is necessary to comment only briefly on the main contentions made by the appellees.

In the first question presented for consideration by this Court, the railroads urged that under a long-standing line of decisions in the district courts the lower court in this case lacked authority to review general revenue orders of the ICC. The railroads noted that this view was supported by this Court's own recent eight-to-zero affirmance in the *Electronic Industries* case which, like the present case, involved an attack on a particular category of rates. The lower court's departure from this settled principle is not only unnecessary and unwarranted but threatens to delay the administrative process and to inflict serious and irreparable harm upon the railroads. See R.R.J.S. 18-22.

In response, EDF asserts that prior cases holding general revenue orders to be unreviewable involved plaintiffs who had available remedies under Section 13 of the Act, 49 U.S.C. § 13, to challenge the lawfulness of individual rates or rate groups. EDF motion 7-8. The appellees in this case, however, are no less interested in a particular category of rates, rates on recyclable commodities, and such rates are equally subject to complaint and investigation under Section 13. EDF also asserts that it is not seeking an alteration of individual rates but enforcement of the ICC's duties under NEPA. The distinction is semantic: prior attempts to review general revenue orders have similarly been premised on claims that the Commis-

sion's action was inconsistent with statutory standards,[19] and EDF's objective, no less than in prior attacks on general revenue orders, is simply to secure lower rates on the commodities in which it asserts an interest.

The lower court's opinion in this case amply reveals that the linchpin of its claimed authority to review general revenue orders is its view that NEPA has altered preexisting jurisdictional or procedural limitations. See 371 F. Supp. at 1297-98. In the railroads' submission, this is directly contrary to what this Court held in *SCRAP* in considering the closely-related issue of the lower court's claimed authority to enjoin railroads rates pending the outcome of ICC general revenue proceedings. 412 U.S. at 694-95. In all events, in the face of the established line of district court decisions already referred to, the eight-to-zero decision in *Electronic Industries Ass'n*, and the determination made by this Court in *SCRAP*, the question of the lower court's authority to review general revenue orders certainly presents a substantial question that makes summary disposition of the appeal here inappropriate.[20]

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[19] See, *e.g.*, *Electronic Industries Ass'n* v. *United States*, *supra*, 310 F. Supp. at 1288-89; *Algoma Coke & Coal Co.* v. *United States*, 11 F. Supp. 487, 482 (E.D. Va. 1935).

[20] ISIS in its motion (p. 7) asserts that it is "unnecessary" for this Court to reach this issue because allegedly "NEPA review of general revenue orders is unlikely to be a recurring issue . . . ." In fact, the issue is inevitably going to be recurring, until resolved by this Court, because of the frequency of general revenue proceedings (see R.R.J.S. 22) and the economic interest of the shippers in opposing rate increases despite railroad cost increases. Moreover, this case involves a direct appeal in which the lower court's authority to act and the validity of its decision are necessarily presented.

A second important question for review arises from the lower court's disapproval of the Commission's extensive and detailed environmental impact statement in this case which, as the lower court acknowledged, met "the prescriptions of NEPA as to form." 371 F. Supp. at 1301. The railroads' jurisdictional statement asserted that the lower court's action went far beyond the permissible limits of judicial review by substituting the court's judgment on substantive issues for that of the agency and in virtually dictating the course of proceedings on remand. The railroads also directed attention to the continuing importance of the questions whether impact statements are reviewable on substantive grounds and if so, under what standard, and to the division of authority on these questions in the lower courts. [21]

The main response of all the appellees is that the lower court in this case limited its review to determining the "procedural adequacy" of the impact statement.[22] This contention is answered by even a brief examination of the lower court's opinion. In detailed criticism on the *substance* of the ICC's impact

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[21] NARI's motion (pp. 7, 14) places special emphasis upon *City of New York* v. *United States*, 337 F. Supp. 150 (E.D.N.Y. 1972), which required an environmental impact statement in a railway abandonment proceeding where no such statement had been prepared. In the present case, however, a detailed impact statement has been prepared; and the pertinent decision is the court's *second* opinion in *City of New York*, 344 F. Supp. 929, sustaining the impact statement and emphasizing the very limited office of judicial review once the impact statement has been furnished.

[22] *E.g.*, EDF motion 10. See also ISIS motion 9; NARI motion 15.

statement, the court faults the statement on the alleged grounds that it does not accept arguments of the environmentalists (371 F. Supp. at 1302); does not offer "any rigorous price sensitivity studies of its own" (*id.* at 1303); omits "any comprehensive alternative analysis of the relative cost contribution of secondary and primary materials" (*id.*); does not respond to a particular statement made in a particular study propounded by ISIS (*id.*); does not contain an analysis "of how the underlying rate structure itself affects the environment" (*id.* at 1304); and omits "an elasticity study" favored by the lower court (*id.* at 1305). Apart from the lack of support for these criticisms (see, *e.g.*, R.R.J.S. 24 n. 31), they do not square with any claim that the court's review was merely "procedural."

One related contention made by the lower court is repeated with great vigor in the motions of both EDF and ISIS. Noting that the Commission focused primarily on the environmental impact (if any) of the rate increases involved in *Ex Parte No. 281* and that it is investigating the rate structure itself in *Ex Parte No. 270*, EDF's motion (pp. 12-14) asserts that this amounts to a claim that the Commission may decide for itself when it will comply with NEPA. See also ISIS motion 7-8. The Commission's approach, which is the only feasible one (see Gov. J.S. 14-16), is entirely consistent with NEPA. The statutory language, ignored by appellees, requires an impact statement addressed to the "proposed action" before the agency (Section 102(2)(C)), and this surely requires that the Commission's environmental impact analysis

focus primarily upon the particular rate increase involved in the proceeding. [23]

Finally, in discussing the single truly "procedural" issue in the case, the lower court declared an environmental impact statement must be prepared not only prior to the agency's decision, but also prior to a hearing, even though no decision is made at the hearing stage. This is directly inconsistent with the language of NEPA which requires only that the agency's decision "include" an impact statement in appropriate cases. The statutory language that the impact statement shall "accompany" the proposal through "existing agency review processes" simply has no application where, as here, there is only one decision-making stage involved in the proceeding and no subsequent "agency review processes" exist.

On this point the appellees largely confine themselves to asserting that the lower court was correct and make no effort to come to grips with the language of NEPA or the fact that general revenue proceedings involve only one decision-making stage. They do contend that the request for review on this point merely seeks an "advisory" opinion on this issue. *E.g.*, ISIS motion 12. This contention is clearly mistaken since the lower court specifically relied on the lack of a prehearing impact statement as a subsidiary basis for invalidating the impact statement. 371 F. Supp. at 1300.

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[23] As the railroads previously noted (R.R.J.S. 24 n.31), the Commission did in fact give attention to the underlying rate structure but, in view of *Ex Parte No. 270*, properly did not attempt to turn the present general revenue proceeding into an extensive discussion of all past and future ramifications of the rate structure for environmental interests.

The railroads demonstrated (R.R.J.S. 31-32) that the lower court's approach would require the Commission to add an entirely new and complicating stage to its general revenue proceedings. Even under existing practice, the Commission is often hard pressed to complete such proceedings before the end of the seven-month suspension period, and such delays necessarily cause the railroads to lose substantial and urgently needed revenues. Thus, the lower court's determination not only presents a serious legal issue but also has immediate adverse consequences for the efficient operation of the administrative process and for the financial well being of the nation's railroad industry.

CONCLUSION

For the reasons stated, the Court should note probable jurisdiction of the appeal.

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